NO. 83-1106

In the Supreme Court of the United States

OCTOBER TERM, 1983

C'EST LA PLACE,

APPELLANT

VS.

GRONER APARTMENTS,

APPELLEE

On Appeal From the Denial of Writ of Certiorari
by the Louisiana Supreme Court

MOTION TO DISMISS APPEAL

MORROW AND MORROW
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May it Please the Court:

I. OBJECT

The object of this motion is to dismiss appellant's appeal in this case as not being within the jurisdiction of the United States Supreme Court, for the following reasons: The appeal is not taken in conformity to 28 U.S.C. 1257(2). The appeal does not present a substantial federal question. The federal question sought to be reviewed, though

appellee continues to assert he nonexistence of any substantial federal question, were neither timely nor properly raised, nor expressly passed on. The judgment of the state court rests on an adequate nonfederal basis. The grounds for this appeal are fictitious and frivolous and are not supported by facts or the law. Finally, appellees are seeking to have all costs of this appeal, including printing fees for this motion, assessed against defendant-appellant, C'est La Place.

II. FACTS ON WHICH THIS MOTION TO DISMISS IS BASED

Plaintiff-appellee bases this motion to dismiss on the following facts:

1. In its jurisdictional statement, appellant relies solely on 28 U.S.C. 1257(2) as conferring jurisdiction on this Honorable Court. 28 U.S.C. 1257(2) states:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (2) "By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

2. On page 4 of its jurisdictional statement, appellant states or implies that Louisiana Civil Code Articles 2561 et. seq. were "assailed on federal constitution grounds" by

it throughout the state proceedings, "thereby satisfying the first prerequisite to this Court's jurisdiction."

3. The assertion by appellant that it assailed Louisiana Civil Code Articles 2561 et. seq. on federal constitutional grounds is totally false and unsupported by the record. This writer found this assertion by appellant to be so incredulous and misleading, that a request has been made by appellee to the Clerk of the Court of the Sixteenth Judicial District Court, Parish of Iberia, State of Louisiana, to certify and transport certain portions of the record to this Honorable Court.

4. Appellee has requested that the Clerk certify and transport all; pleadings, returns, reasons for judgment, judgments and briefs, filed by or affecting both appellant and appellee in the Louisiana district court proceedings, Louisiana Third Circuit Court of Appeal proceedings, and in proceedings before the Louisiana Supreme Court.

5. The record being certified and transported to this Honorable Court will clearly show that appellant has never questioned the unconstitutionality of Louisiana Civil Code Article 2561 et. seq., or for that matter, any other statute of the State of Louisiana. The assertion by appellant that it has challenged statutes of the State of Louisiana on federal constitutional grounds is a blatant attempt to mislead and convince this Court that it has jurisdiction, when it clearly does not. This writer challenges appellant to cite to this Court any part of the record wherein it challenged the constitutionality of any statute of Louisiana. The record clearly reflects that this was never done.

6. Although the portions of the record being certified and transmitted to this Court will *not* show that appellant

assailed any Louisiana statute on federal constitutional grounds, it will reflect certain facts that will clearly demonstrate appellant's jurisdictional statement is without merit and that this Honorable Court does not have jurisdiction.

7. The record being certified and transmitted to this Court will show that on August 26, 1981, appellee filed suit against two defendants. The two named defendants were Controlled Building Systems, Inc. and appellant, C'est La Place. The object of the suit was to obtain the return of certain immovable property sold by appellee for the failure to receive the purchase price.

8. The record being certified and transmitted to the Court will show that both defendants were properly served with a copy of the lawsuit. The appellant's complaints of "lack of notice" can be viewed in a better perspective when the record reflects it was properly named and served in the lawsuit from the initiation of the lawsuit. What better notice can one have than being included in a lawsuit and *actually* served with the lawsuit?

9. The record being certified and transmitted to the Court will show that appellant's co-defendant, Controlled Building Systems, Inc., did not file any responsive pleadings to the original complaint, despite being properly served with said lawsuit.

10. The record being certified and transmitted to the Court will show appellee entered a preliminary default against appellant's co-defendant and confirmed this default judgment in open court on October 1, 1981. The judgment confirmed on October 1, 1981 was against appellant's co-defendant only and made no mention of

appellant.

11. The record being certified and transmitted to the Court will show that appellant had the right to appeal the judgment taken against its co-defendant on October 1, 1981, but chose not to. Instead, appellant filed a motion to annul the judgment entered against its co-defendant. The argument asserted by appellant in its motion for annullment of the judgment taken against its co-defendant was that "Due Process" required that it be given notice before a default judgment could be properly taken against a co-defendant who was properly served and did not make an appearance. No legal authority was cited by appellant in support of its motion to annul. Instead, appellant argued that the default judgment taken against its co-defendant and predecessor-in-title, would be prejudicial and preclude it from asserting a proper defense to the suit.

12. The record being certified and transmitted to the Court will show that appellee also argued that the judgment entered against appellant's co-defendant would preclude appellant from asserting any defenses to the suit! In fact, after the judgment against appellant's co-defendant became final under state law, appellee moved for summary judgment against appellant, based on the finality of the judgment against its co-defendant and predecessor-in-title.

13. The record being certified and transmitted to the Court will show that the trial court rejected appellee's motion for summary judgment and held that the prior default judgment taken against appellant's co-defendant could not serve to prejudice any right of appellant to assert any defenses to the action brought against it. The trial court also denied appellant's motion to annul the judgment

properly taken against its co-defendant.

14. The record being certified and transmitted to this Court will show that a trial on the merits was held on August 24 and August 25, 1982. During this two day trial, appellant was allowed to assert any and all defenses to the action brought against it, including defenses of its co-defendant.

15. The record being certified and transmitted to this Court will show that on September 29, 1982, the trial court ruled in favor of appellee and against appellant, based on the evidence adduced at the trial held on August 24 and August 25, 1982, and without any regard or reference to the prior default judgment taken against appellant's co-defendant.

16. The record being certified and transmitted to this Court will show that appellant continued to complain of a denial of "Due Process" because it was not notified when a default judgment was taken against its co-defendant, in spite of the following facts:

(a) Appellant was properly named and served with the complaint from the date of initiation of the lawsuit.

(b) The trial judge specifically ruled that the default judgment taken against appellant's co-defendant could not operate to preclude appellant from asserting any defenses.

(c) Appellant was granted a two day trial wherein it was entitled to raise any and all defenses.

(d) The trial court ruled against appellant after

> the trial and without reference to the prior judgment entered against its co-defendant.

This vague and nebulous "Due Process" argument was never even addressed and was thus impliedly rejected by the Louisiana Third Circuit Court of Appeal and the Louisiana Supreme Court. In fact, in its denial of appellant's writ application to the Louisiana Supreme Court, The Chief Justice of the Supreme Court rejected this argument in the following language:

> "Dixon, C.J., concurs in the denial. C'est La Place was a named defendant, was served (then a default judgment was entered and confirmed against CBS), answered and *another trial* was held. *Therefore, the result is correct.*" (Emphasis added)

Appellee has had to pay the sum of $1,378.40 to have this Motion to Dismiss printed. (See Appendix hereto, p. A-1, infra)

II. WHY THIS APPEAL SHOULD BE DISMISSED

The first reason this appeal should be dismissed is that the record does not support appellant's assertion in its jurisdictional statement that this Court has jurisdiction under 28 U.S.C. 1257(2). As discussed in the prior section of this Motion, the record being certified and transmitted to this Court will show that appellant has never assailed any statute of the State of Louisiana on federal constitutional grounds as alleged. Thus, no Louisiana trial court or appellate court has ever passed on the constitutionality of any state statute. The first time appellant has ever questioned the unconstitutionality of any statute of the State of

Louisiana is in the Jurisdictional Statement filed by it before this Court. This Court has consistently held that the failure of an appellant to either timely and properly raise a federal question or to question the validity of a state statute on federal constitutional grounds will entitle an appellee to a dismissal of the appeal. See: *Webb v. Webb*, Ga. 1981, 101 S.Ct. 1889, 451 U.S. 493, 68 L.Ed.2d 392; *Tacon v. State of Arizona*, Ariz. 1973, 93 S.Ct. 998, 410 U.S. 351, 35 L.Ed.2d 346; *Street v. New York*, N.Y. 1969, 895 S.Ct. 1354, 3914 U.S. 576, 22 L.Ed.2d 572; *Cardinale v. Louisiana*, La. 1969, 89 S.Ct. 1162, 394 U.S. 437, 22 L.Ed.2d 398; and *Pickering v. Board of Ed. of Township High School Dist.*, Ill. 1968, 88 S.Ct. 1731, 391 U.S. 563, 20 L.Ed.2d 811.

The second reason that appellant's appeal should be dismissed is because appellant has failed to make a showing that there are substantial federal questions existing in this case as to bring this case into the jurisdiction of this Court for plenary consideration, in violation of Supreme Court Rule 15.1(g). In the section of its Jurisdictional Statement dealing with "Substantiality of the Question Presented", appellant attempts to convince this Court that it has been deprived of property rights without the proper notice and right to a hearing guaranteed under the due process clause of the Fourteenth Amendment. The record being certified and transmitted to the Court will demonstrate that the facts will not support this contention. A careful reading of appellant's jursidictional statement reveals that appellant is not complaining that it did not receive proper notice or a hearing. The reason for this is that appellant was made a party to this litigation at the commencement of this action, was properly served with the petition and was allowed to present any and all defenses in a two day trial held on August 24 and August 25, 1982. Rather,

appellant is actually complaining that it has been denied "Due Process of Law" because a default judgment was properly rendered against a co-defendant without prior notice to appellant. Appellant has not cited any authority in support of this novel proposition that the Due Process Clause of The Fourteenth Amendment to the United States Constitution requires prior notice to a defendant, properly named and served in a lawsuit, before a default judgment can be taken against a co-defendant who is properly served and chooses not to make an appearance. Despite what appellant states in its jurisdictional statement, this is the only federal question ever raised by appellant and addressed by either the trial court or the appellate courts. Appellant has artfully seized upon some dicta in the decision rendered by the Louisiana Third Circuit Court of Appeal decision and quoted it extensively in its Jurisdictional Statement in an attempt to convince this Court that the "holding" of that court is that appellant was not entitled to notice or a hearing of any kind before the property could be adjudicated to plaintiff. However, the record being certified and transmitted to the Court will show that appellant did receive proper notice and a full hearing on the merits. Therefore, the issue of whether appellant was given proper notice and hearing was never presented to the Louisiana Third Circuit Court of Appeal. The only issue before the Louisiana Third Circuit Court of Appeal was whether "Due Process" entitled appellant to prior notice before a default judgment could be entered against a co-defendant who had been properly served and chose not to make an appearance. The Louisiana Third Circuit Court of Appeal ruled that "Due Process" did not require that such notice be given to appellant. Since this was the only issue before the Louisiana Third Circuit Court of Appeal, this was the holding of the court. However, in so holding, the Louisiana Third Circuit Court of Appeal went much further than was

necessary in reaching its decision and implied that appellant need not ever have been named in the original complaint nor served with a copy of the complaint, or be given a hearing of any kind. This language of the decision is clearly dicta since appellant was named in the original complaint, properly served with a copy of said complaint and given an opportunity to present any and all defenses at trial. It is this language of the Louisiana Third Circuit Court of Appeal, which is clearly dicta, that appellant has seized upon and quoted extensively to this Court in its Jurisdictional Statement as being the "holding" of the court, which has deprived appellant of its property without "Due Process of Law". Appellee urges this Honorable Court to reject appellant's efforts to mislead it as to the holding of the Louisiana Third Circuit Court of Appeal in an attempt to establish that this case involves a "substantial federal question". Appellant was properly named in the original complaint, was properly served with a copy of the original complaint and was granted a hearing to present all of its defenses. These facts clearly make this case distinguishable from the cases cited by appellant in support of its argument that this case involves a "Substantial Federal Question". Namely; *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 360 (1950), and *Mennonite Board of Missions v. Adams*, 77 L.Ed.2d 180 (1983). Neither *Mullane* nor *Mennonite* involved a party who was actually named in the original complaint and given *actual notice* by properly being served with said complaint. The record being certified and transmitted to the Court will clearly show that appellant was given *actual notice* by being named in the original complaint and by being properly served with said complaint. The record being certified and transmitted to the Court will *further* show that the only "federal question" ever raised by appellant is that the Due Process Clause of the Fourteenth Amendment requires

that it be given prior notice before a default judgment can be entered against a co-defendant who has been properly served and chooses not to make an appearance. As stated previously, no authority has been cited by appellant in support of this novel proposition and thus appellant has failed in its burden to establish that this case involves a "substantial federal question". Thus, its appeal should be dismissed.

The final and most compelling reason for the dismissal of this appeal is that the judgment of the state court rests on an adequate non-federal basis. This is clear from an examination of the following facts and pleadings:

1. On August 26, 1981, suit was filed by appellee against appellant and a Louisiana Corporation by the name of Controlled Building Systems, Inc. The petition filed sought the return of certain immovable property sold by appellee for the failure to receive the purchase price. Appellee had originally sold the property to Controlled Building Systems, Inc. and appellant was a subsequent purchaser who owned the property at the time of the initiation of the lawsuit.

2. Both Controlled Building Systems, Inc. and appellant were properly served with a copy of the lawsuit. While appellant made a timely response to the petition, Controlled Building Systems, Inc. did not make any appearance.

3. On October 1, 1981, appellee took a default judgment against Controlled Building Systems, Inc. (See Appendix hereto, pp. A-2-3, infra)

4. On October 5, 1981, appellant filed a motion to

annul the default judgment taken against its co-defendant on October 1, 1981. (See Appendix hereto, pp. A-4-8, infra) Appellant complained that the default judgment, taken without notice to it, prejudiced its right to defend the action and assert defenses.

5. After the October 1, 1981 judgment taken against Controlled Building Systems, Inc. had become final, appellee moved for summary judgment against appellee, on the basis that the final judgment against Controlled Building Systems, Inc. was conclusive and binding against appellant, who was merely a subsequent purchaser. (See Appendix hereto, pp. A-9-13, infra)

6. Thus, both appellant and appellee were urging the trial court to hold that the default judgment taken against Controlled Building Systems, Inc. was conclusive as to the rights of appellant. Appellant was urging this in a motion to annul the judgment and appellee was urging this in a motion for summary judgment against appellant.

7. The trial court rejected both arguments on January 22, 1982 and held that the default judgment could not operate to preclude appellant from asserting its defenses to the action. (See Appendix hereto, pp. A-14-15, infra)

8. Thus, the prejudice that appellant complained of and is still complaining of *NEVER, IN FACT, OCCURRED!* The trial court was overprotective of appellant's "Due Process" rights and allowed it to assert any and all defenses it had to the suit in a two-day trial held on August 24 and August 25, 1982.

9. After allowing appellant to assert any and all

defenses to the suit, in the August 24 and 25, 1982 trial, the trial judge found in favor of appellee and against appellant, without any reference to the default judgment previously entered against appellant's co-defendant. (See Appendix hereto, pp. A-16-20, infra)

As stated previously the only federal question ever raised by appellant, in any of the state proceedings is that it was a denial of Due Process of Law under the Fourteenth Amendment of the United States Constitution for the trial court not to have granted its motion to annul the default judgment on the grounds it was entitled to prior notice before the entry of said default judgment. Assuming for the sake of argument that this were true, then it would be a vain and useless act for this court to review this case and hold that the motion to annul the judgment should have been granted by the trial court. The reason for this is that the ruling of the trial court, following the trial held on August 24 and 25, 1982, is a separate and adequate state grounds to support the decision. The fact that the result in this case rests on a separate and adequate state grounds was expressly stated by Chief Justice Dixon of the Louisiana Supreme Court in the denial of appellant's application for writ of certiorari. (See Appendix hereto, A-21-22 infra) In concurring in the denial of the writ, Justice Dixon stated:

> "C'est La Place was a named defendant, was served (then a default judgment was entered and confirmed against CBS), *answered and another trial was held. Therefore, the result is correct.*" (Emphasis added)

This Court has consistently stated that it will not issue advisory opinions and that it will not review a case involving

federal questions when there is an adequate and separate state ground to support the decision. *Zacchini v. Scripps-Howard Broadcasting Company*, Ohio 1977, 97 S.Ct. 2849, 433 U.S. 562, 53 L.Ed.2d 965. The August 24 and 25, 1982 trial and the reasons for judgment rendered thereafter are clearly an "adequate and separate State grounds", which support the result reached, and therefore appellant's appeal should be dismissed.

IV. CONCLUSION

Appellant has sought to bring an unwarranted appeal, and the appeal should be dismissed for lack of jurisdictional requirements, with all costs, including the costs of the printing of this motion to dismiss, being assessed against appellant.

IT IS SO MOVED

Respectfully Submitted,

MORROW AND MORROW
PATRICK C. MORROW
JAMES P. RYAN
Attorney For Appellee
324 West Landry
Opelousas, Louisiana 70571-7090
TELEPHONE: (318) 948-4483

CERTIFICATE OF SERVICE

I hereby certify that all parties who are required to be served with a copy of this Motion to Dismiss Appeal are:

1. C'est La Place
   through its counsel of record
   Ms. Corinne Ann Morrison
   1500 First N.B.C. Building
   New Orleans, Louisiana 70112

2. William J. Guste, Jr.
   Attorney General
   7th Floor, 234 Loyola Building
   New Orleans, Louisiana 70112

I hereby certify that a copy of this Motion to Dismiss Appeal has been served on the above-listed parties by United States mail, postage prepaid.

Opelousas, Louisiana, this 14th day of February, 1984.

PATRICK C. MORROW

APPENDIX "A"

A B LETTER SERVICE
327 Chartres Street
P.O. Box 2409
New Orleans, LA 70176

Morrow & Morrow
324 W. Landry
P.O. Drawer 7090
Opelousas, LA 70570

Typeset, Layout, Print & Collate
Motion to Dismiss in case
C'est La Place vs. Groner Apartments
(6x9 style, 50 Copies)

Typeset and Layout	
39 Pages @ $15.00	$ 585.00
Print & Collate	
39 Pages @ $15.00	585.00
Search Authorities &	
Table of Contents	20.00
Cover, Bind & Trim	40.00
Sub-Total	1,230.00
Tax	98.40
Estimated Shipping	50.00
TOTAL	$1,378.40

APPENDIX "B"

RECORDED IN MORTGAGE BOOK A421 AT FOLIO 533, ENTRY NO. 81-8145

16TH JUDICIAL DISTRICT COURT
DOCKET NO. 48,246
IBERIA PARISH, LOUISIANA

GRONER APARTMENTS

VERSUS

CONTROLLED BUILDING SYSTEMS, INC., ET AL

JUDGMENT

This matter came to be heard on Thursday, October 1, 1981, and, after considering the pleadings and the evidence, the court considering the law and the evidence to be in favor of plaintiff, GRONER APARTMENTS and against defendant, CONTROLLED BUILDING SYSTEMS, INC.:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, GRONER APARTMENTS, and against defendant, CONTROLLED BUILDING SYSTEMS, INC., dissolving forever the act of sale between the parties dated October 25, 1979, and introduced at trial as Plaintiff's Exhibit 2.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, GRONER APARTMENTS, and against defendant, CONTROLLED BUILDING SYSTEMS, INC., in the full sum of TWO HUNDRED FOURTEEN THOUSAND

SEVEN HUNDRED TEN AND 19/100 ($214,710.19) DOLLARS, together with legal interest thereon from date of judicial demand until paid and for all costs of these proceedings.

New Iberia, LOUISIANA, this 1st day of October, 1981.

HONORABLE ROBERT E. JOHNSON

MORROW & MORROW
Attorneys for Plaintiff

By: /S/JAMES P. RYAN
JAMES P. RYAN
P.O. Box 897
324 W. Landry
Opelousas, LA 70570

Filed October 2, 1981

APPENDIX "C"

16TH JUDICIAL DISTRICT COURT
DOCKET NUMBER: 48246
PARISH OF IBERIA
STATE OF LOUISIANA

GRONER APARTMENTS

VERSUS

CONTROLLED BUILDING SYSTEMS, INC., ET AL.

MOTION FOR ANNULMENT OF JUDGMENT

On Motion of C'EST LA PLACE, sought to be made defendant herein, and on suggesting to the Court that the judgment rendered in the above entitled and numbered cause is a nullity, and that the same should be annulled by this Honorable Court for the following reasons, to wit:

A.

Your defendant, C'EST LA PLACE, is an indispensable party to these proceedings and must be given notice of and allowed to participate and be heard in all actions taken in these proceedings.

B.

Furthermore, petitioner took a preliminary default against Controlled Building Systems, Inc. on September 25, 1981, and presented evidence at a confirmation hearing on October 1, 1981.

C.

As an indispensable party to this litigation, the rights of C'EST LA PLACE are so interrelated and intertwined with the rights of defendant, CONTROLLED BUILDING SYSTEMS, INC., that defendant, C'EST LA PLACE, has a right to receive notice of all hearings and actions taken herein and the right to be heard at all proceedings on the premises.

D.

By allowing petitioner to proceed against defendant, CONTROLLED BUILDING SYSTEMS, INC., without notice to defendant, C'EST LA PLACE, your defendant, C'EST LA PLACE, has been denied an opportunity to be heard on these issues and to present a defense herein.

E.

That the law of Louisiana, and equitable consideration require that the confirmation proceedings held on October 1, 1981, as against Controlled Building Systems, Inc. and any judgment entered therein be annulled and set aside.

WHEREFORE, premises considered, mover, C'EST LA PLACE, prays that this motion be fixed for hearing on a date and time to be fixed by this Honorable Court and that after all legal delays and due proceedings had, there be judgment rendered in favor of defendant, C'EST LA PLACE, maintaining said motion and declaring any judgment rendered herein in favor of plaintiff and against Controlled Building Systems, Inc. a nullity, and that said judgment be nullified and vacated.

AND FOR ALL GENERAL AND EQUITABLE RELIEF, ETC.

MARTIN & TAULBEE
A PROFESSIONAL LAW CORPORATION

BY: _____
EDWARD O. TAULBEE, IV
Attorney for C'est La Place
P. O. Box 3705
Lafayette, Louisiana 70502
(318) 232-4744

ORDER

IT IS ORDERED that plaintiff in the above entitled and numbered cause show cause on the _____ day of _____, 1981, why any judgment rendered in the above entitled and numbered cause should not be declared a nullity and the same nullified and vacated.

_____, Louisiana, this _____ day of _____, 1981.

_____
DISTRICT JUDGE

CERTIFICATE

I HEREBY CERTIFY that copies of the above and foregoing Motion have been forwarded to all counsel of record by depositing copies of same in the United States Mail, postage pre-paid and properly addressed.

Lafayette, Louisiana, this 5 day of October, 1981.

/S/EDWARD O. TAULBEE, IV
EDWARD O. TAULBEE, IV

16TH JUDICIAL DISTRICT COURT
DOCKET NUMBER: 48246
PARISH OF IBERIA
STATE OF LOUISIANA

GRONER APARTMENTS

VERSUS

CONTROLLED BUILDING SYSTEMS, INC., ET AL.

EXCEPTIONS

NOW INTO COURT, through undersigned counsel, comes C'EST LA PLACE, sought to be made defendant in the above entitled and numbered cause, who, appearing herein solely for the purposes of these exceptions and with full rights being reserved to except and plead hereafter, avers:

1.

Defendant, C'EST LA PLACE, avers that it is an indispensable party to these proceedings and must be notified of and allowed to be heard at any proceedings herein.

2.

Defendant excepts to any proceedings herein which defendant does not have previous notice of or is not allowed to take part and be heard in.

WHEREFORE, premises considered, defendant, C'EST LA PLACE, prays that these exceptions be maintained and that after all delays and due proceedings had,

there be judgment rendered herein in favor of defendant, dismissing plaintiff's suit at plaintiff's cost.

AND FOR ALL GENERAL AND EQUITABLE RELIEF, ETC.

MARTIN & TAULBEE
A PROFESSIONAL LAW CORPORATION

BY: /S/EDWARD O. TAULBEE, IV
EDWARD O. TAULBEE, IV
Attorney for C'est La Place
P.O. Box 3705
Lafayette, Louisiana 70502
(318) 232-4744

CERTIFICATE

I HEREBY CERTIFY that copies of the above and foregoing Exceptions have been forwarded to all counsel of record by depositing copies of same in the United States Mail, postage prepaid and properly addressed.

Lafayette, Louisiana, this 5 day of October, 1981.

/S/EDWARD O. TAULBEE, IV
EDWARD O. TAULBEE, IV

APPENDIX "D"

16TH JUDICIAL DISTRICT COURT
DOCKET NO. 48,246
IBERIA PARISH, LOUISIANA

GRONER APARTMENTS

VERSUS

CONTROLLED BUILDING SYSTEMS, INC., ET AL

MOTION FOR SUMMARY JUDGMENT

NOW INTO COURT, through undersigned counsel, comes the plaintiff, GRONER APARTMENTS, and moves this Court for summary judgment in its favor and against the defendant, C'EST LA PLACE, declaring the rights of C'EST LA PLACE to be identical to the rights of its vendor-in-title and co-defendant, CONTROLLED BUILDING SYSTEMS, INC., and recognizing plaintiff as the owner of the property and rents generated by the property sold by plaintiff to CONTROLLED BUILDING SYSTEMS, INC. on October 25, 1979, and subsequently purchased by C'EST LA PLACE on December 12, 1980. There is no genuine issue of material fact and plaintiff herein is entitled to judgment as a matter of law, for the following reasons, to-wit:

1.

On October 25, 1979, plaintiff sold to the defendant CONTROLLED BUILDING SYSTEMS, INC. an apartment complex located in Iberia Parish, Louisiana. In payment for the purchase of this property, CONTROLLED

BUILDING SYSTEMS, INC. executed two promissory notes in the amount of ONE HUNDRED EIGHTY-FIVE THOUSAND AND NO/100 ($185,000.00) DOLLARS. The October 25, 1979 Act of Sale was recorded in the conveyance records of Iberia Parish, Louisiana, on November 7, 1979, and said recordation contains a recital indicating the sale to be a credit transaction. A certified copy of the Act of Sale dated October 25, 1979, has already been filed into the record of this matter.

2.

On November 9, 1979, defendant CONTROLLED BUILDING SYSTEMS, INC. sold the property acquired from plaintiff on October 25, 1979, to one Alexander Magnus. A certified copy of this Act of Sale has also previously been filed into the record.

3.

On December 12, 1980, Alexander Magnus sold the property acquired by him on November 9, 1979, to defendant C'EST LA PLACE. A certified copy of this Act of Sale is attached hereto as Exhibit A.

4.

On August 26, 1980, plaintiff herein filed suit against defendants, CONTROLLED BUILDING SYSTEMS, INC. and C'EST LA PLACE, seeking a dissolution of the October 25, 1979 sale to CONTROLLED BUILDING SYSTEMS, INC. and a return of the property and rents free of all subsequent alienations and encumbrances.

5.

Personal service was made upon defendant, CONTROLLED BUILDING SYSTEMS, INC. on August 31, 1981, through its registered agent for service of process. A certified copy of the Articles of Incorporation of CONTROLLED BUILDING SYSTEMS, INC., has previously been filed into the record of this matter. No answer was filed by CONTROLLED BUILDING SYSTEMS, INC., and on September 23, 1981, a preliminary default was entered at the request of plaintiff against said defendant.

6.

On October 1, 1981, the preliminary default against CONTROLLED BUILDING SYSTEMS, INC. was confirmed in open court before the Honorable Robert E. Johnson. On finding the law and the evidence to be in favor of plaintiff herein and against CONTROLLED BUILDING SYSTEMS, INC., judgment was granted dissolving the sale of October 25, 1979, between plaintiff and CONTROLLED BUILDING SYSTEMS, INC. The legal delays for appeal having expired, the judgment entered on October 1, 1981, is now a final and binding judgment.

7.

A vendor who is successful in dissolving a sale for the failure of his vendee to pay the purchase price is entitled to a return of the property free of all subsequent alienations and encumbrances. Third party purchasers or mortgagees are placed on notice by the credit sale recorded in the public records and in the event the purchase price is not paid, are relegated to a personal action against their

vendor-in-title. This principle of law is discussed in more detail in the attached memorandum.

8.

Since plaintiff herein has obtained a final judgment against defendant CONTROLLED BUILDING SYSTEMS, INC., dissolving the sale of October 25, 1979, for failure of the said defendant to pay the purchase price, plaintiff is entitled to a return of the property free of all subsequent alienations and encumbrances. Defendant C'EST LA PLACE is a subsequent purchaser of the property made subject of this litigation and acquires only the rights of its ancestor-in-title, CONTROLLED BUILDING SYSTEMS, INC.

9.

Since the judgment rendered against CONTROLLED BUILDING SYSTEMS, INC. is now final, all defenses of CONTROLLED BUILDING SYSTEMS, INC. are extinguished. Plaintiff is entitled to a judgment against defendant C'EST LA PLACE since said C'EST LA PLACE is a subsequent purchaser of the subject property from CONTROLLED BUILDING SYSTEMS, INC.

WHEREFORE, plaintiff prays for judgment in its favor and against the defendant C'EST LA PLACE, declaring the rights of C'EST LA PLACE to be no greater than the rights of its vendor-in-title and co-defendant, CONTROLLED BUILDING SYSTEMS, INC., and recognizing plaintiff as the owner of the subject property and rents generated by the said property sold by plaintiff to CONTROLLED BUILDING SYSTEMS, INC. on October 25, 1979, and subsequently purchased by C'EST LA

PLACE on December 12, 1980.

MORROW & MORROW

Attorneys for Plaintiff

BY: _____

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APPENDIX "E"

16TH JUDICIAL DISTRICT COURT
PARISH OF IBERIA
STATE OF LOUISIANA

GRONER APARTMENTS

vs. NO. 48,246

CONTROLLED BUILDING SYSTEMS, INC. and
C'EST LA PLACE

REASONS FOR JUDGMENT

On August 26, 1981, the plaintiff filed this suit against Controlled Building Systems and C'est la Place, showing that in October of 1979 Groner Apartments sold to the defendant, Controlled Building Systems, Inc., a certain tract of land in Iberia Parish, and alleged that they failed to pay the purchase price, therefore, they wanted to rescind the sale. The plaintiffs then alleged that the defendant, Controlled Building Systems, Inc., had sold the subject property to C'est la Place, a foreign partnership, and that the sale against them was null also.

Controlled Building Systems, Inc. filed no response to these proceedings and a preliminary default was entered against them on September 25, 1981. On October 1, 1981 this judgment of default was confirmed in a nonadversary proceeding.

The plaintiff now moves for a summary judgment and sets up as a bar to any trial by the defendant, C'est la Place, the default judgment, saying that it is convlusive. This is a non sequitor.

While it may be that the judgment of default is conclusive as to Consolidated Building Systems, Inc., it is not conclusive as to C'est la Place, who has timely filed an answer to these proceedings and intends to defend the proceedings. If we follow the rationale set forth by the plaintiff, the mere fact that the judgment was confirmed would preclude C'est la Place from setting up any defense to these proceedings at all. It cannot operate to preclude C'est la Place from setting up any offenses or defenses that it may have. Therefore, there is a question in this Court's mind as to the applicability of a motion for a summary judgment in this case. Since there is a question of the applicability, the motion necessarily must be denied.

The defendant, C'est la Place, has filed a motion for the annullment of the judgment of confirmation and this, too, will be denied.

Let a formal judgment consistent with these views be presented for signature.

Officially in Chambers at New Iberia, this 22nd day of January, 1982.

ROBERT M. FLEMING
DISTRICT JUDGE

APPENDIX "F"

16TH JUDICIAL DISTRICT COURT
PARISH OF IBERIA
STATE OF LOUISIANA

GRONER APARTMENTS

vs. NO. 48,246

CONTROLLED BUILDING SYSTEMS, INC., ET AL

REASONS FOR JUDGMENT

On August 26, 1981, Groner Apartments, a Louisiana partnership composed of David W. Groner, Katherine Nelson Groner and Marilyn Lee Groner, filed this suit against Controlled Building Systems, Inc., a Louisiana Corporation, and C'est La Place, an Illinois partnership, seeking to set aside a sale dated October 25, 1979, whereby Groner Apartments sold to Controlled Building Systems, Inc. a tract of land which was subsequently by mesne conveyances sold to C'est La Place.

The sale by Groner Apartments to Controlled Building Systems, Inc. is dated October 25, 1979, and was made for a consideration of $231,000, of which the vendee paid $46,000 cash and the balance of the credit portion was represented by two promissory notes, one in the amount of $40,000 and the other in the amount of $145,000.

The credit deed was unusual in that it did not contain a mortgage in favor of the vendor for the unpaid balance and, further, it did contain a waiver of the vendor's lien in these words:

> It is specifically understood and agreed that the vendor shall not enjoy, and hereby waives and releases, the vendor's lien or privilege provided for in Article 3249, et seq, of the Revised Civil Code of the State of Louisiana, and otherwise granted by law.

Of great significance is the fact that the vendor did not waive his right to revoke the sale on account of the non payment of the purchase price.

In the case of Sliman vs. McBee, 311 So.2d 248 (S.Ct. 1975), the court emphasized that the right of the seller under Civil Code Article 2561, to dissolve the sale for failure of the buyer to pay the purchase price, is an entirely separate and independent remedy from the right of the seller to sue for any amount due on the purchase price. The Court stated:

> Where the commutative contract is one of sale, the special rules governing the contract of sale must be consulted, in addition to the general principles announced above. Article 2438. The principal obligation of the buyer is to pay the price of sale. Article 2549(1). Upon his failure to do so, the vendor has two remedies available: one for the enforcement, or affirmance, of the contract, and the other for its dissolution. The second right, asserted here by Mrs. Sliman, is an independent, substantive remedy available under Article 2561 of the Civil Code that is in no way dependent upon the existance of the security device such as a mortgage or a privilege, which secures the first remedy of the seller, i.e., the enforcement of the buyer's obligation to pay the price agreed upon in the contract of sale.

The Sliman case has been uniformly followed since 1975, and it is the law today. In the Sliman case the vendor there also waived the vendor's lien and the Supreme Court ultimately revoked the sale and put the vendor in the position she was before the sale was made.

This Court comes to the same conclusion.

The issues in this case, while complex, boil down to the question of whether the two promissory notes issued as credit for the Groner-Controlled Building Systems sale are past due. If they are past due, then the Groners succeed in their revocatory action.

The $40,000 note contains the following language in addition to the usual verbiage found in promissory notes. They say:

> Anything herein contained to the contrary notwithstanding, it is specifically understood and agreed that maker shall be under no obligation hereunder unless and until all work (primary or remedial) to be performed or accomplished in connection with the construction and completion of the apartment complex being constructed on the properties described on Annex "A" hereof is completed in accordance with the specifications attached hereto, and made a part hereof, as Annex "B", failing which maker, rather than paying this note in accordance with its tenor to the holder or holders hereof, may apply the monies otherwise due and owing hereunder to the performance and accomplishment of the aforementioned matters, and any such monies so applied shall constitute a credit against monies due and owing hereunder.

The $145,000 contains a clause which is almost identical to the above quoted one. The documents identified with the note is a certificate of substantial completion executed by James L. Firmin, architect, Landura Corporation of Louisiana, contractor, and David Groner, as owner, and attached to it is a punch list showing the corrective items necessary for the completion of the building. The punch list contains 15 items. Of the 15 items on the punch list everything was completed except Item 1-B, which says, "The exterior hardboard siding is not acceptable in its present condition. Siding should be replaced."

Groner Apartments, as the name indicates, began the construction of an apartment complex on some land in Iberia Parish, and executed a mortgage in favor of the Farmers Home Administration, which mortgage was assumed by Controlled Business Systems. The apartment complex was nearly complete when the aforesaid credit sale was executed. The question of the exterior siding was never successfully completed. Groner Apartments was in financial distress at and after the sale to Controlled Building Systems. It recognized the obligation to correct the siding and in an effort to do so they secured a bid from Leon Guillory Building Contractor, Inc. to complete this work for $46,835. Of that amount $19,870 was to be paid upon completion from mortgage funds on hand, and the remaining amount of $25,965 was to be paid by Controlled Building Systems, Inc. from funds owed Groner Apartments (according to the bid.) The bid also said that, "This amount to be deducted from the total amount owed Groner Apartments by Controlled Building Systems, Inc." Groner Apartments did not have the cash at hand to pay the portion of the siding bill, a fact which was known to the defendants, and Groner Apartments called upon the defendants to deduct that amount from the notes that were due them

and to pay the notes according to their tenor. The defendants failed to do so after much demand was put on them to live up to their obligation. This Court finds that the notes were due according to their terms and upon the defendants' failure to pay the notes the plaintiff properly instituted this revocatory action.

It is the opinion of this Court that the plaintiff should have judgment against Controlled Building Systems, Inc. and C'est La Place, declaring the act of sale of October 25, 1979 to be dissolved, and the property returned to petitioner, free from all subsequent alienations and encumbrances. The plaintiff asks for damages for fruits and profits of the subject property since the sale, but these items were not proved by a preponderance of the evidence.

On June 22, 1982 the defendant, C'est La Place, filed a reconventional demand and for the reasons above stated it must fall.

Let a formal judgment consistent with these views be prepared by the attorneys Morrow and Morrow, representing the plaintiff, and submitted to John W. Hutchinson, attorney for C'est La Place, for approval "as to form", and then submitted to this Court for signature.

Officially in Chambers on this 29th day of September, 1982, at Franklin, St. Mary Parish, Louisiana.

ROBERT M. FLEMING
DISTRICT JUDGE

APPENDIX "G"

THE SUPREME COURT OF THE
STATE OF LOUISIANA

GRONER APARTMENTS

VS NO. 83-C-1449

CONTROLLED BUILDING SYSTEMS
AND C'EST LA PLACE

In Re: C'Est La Place applying for Certiorari or Writ of Review, to the Court of Appeal, Third Circuit, No. 83-30; from the 16th Judicial District Court, Parish of Iberia, No. 48,246

October 7, 1983

Denied.

JLD

WFM

JCW

HTL

DIXON, C.J., concurs in the denial. C'est La Place was a named defendant, was served (then a default judgment was entered and confirmed against CBS), answered and another trial was held. Therefore the result is correct.

CALOGERO & BLANCHE, J.J., would grant the writ.

Supreme Court of Louisiana
October 7, 1983

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Clerk of Court
For the Court